beneficial owner of these shares and is not holding them in trust for any person.

The learned judge considered the defence of laches and acquiescence and came to the conclusion that the defendants were unable to rely on that defence. It will suffice if I say that I agree with his views on this point.

In view of the fact that the plaintiff was not aware of her rights until the 6th April 1958, the defendants cannot rely on the Limitation Ordinance, 1953 as a defence.

In the result the declarations and orders made by the court below are set aside. There will be a declaration that the partnership was dissolved on the 6th April 1958. Then there will be a direction that accounts and inquiries be taken and made which will achieve the following result, that is to say, the ascertainment of the value of the plaintiff's share of the partnership at the date of dissolution, which of course includes the two pieces of land at Klang, and the ascertainment of the value of what should be regarded as her share of the profits of the fourth defendant company from the 1st January 1954 to the 6th April 1958. In arriving at the sum due to the plaintiff, account will have to be taken of the payments made to her from time to time. The plaintiff will be entitled to interest from the 6th April 1958 at the rate of six per centum per annum on the balances outstanding from time to time up to the date the full amount due is paid to her.

Thomson L.P. and **Barakbah C.J. (Malaya)** concurred.

Order accordingly.

Solicitors: *Skrine & Co.; T. K. Sen.*

CHAI SAU YIN v. KOK SENG FATT

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) March 16, 1966]

[K.L. — Federal Court Civil Appeal No. 49 of 1966]

Moneylenders — Name of moneylender — Sufficiency of memorandum of loan and authenticated copy — Authenticated copy not exact copy of memorandum — Whether fatal — Moneylenders Ordinance, 1951, ss. 5 & 16.

Construction — Documents — Copy — "True copy" — Authenticated copy.

This was an appeal against the decision of Ong J. who gave judgment in favour of the respondent, a moneylender. The appellant was the registered proprietor of a piece of land in Negri Sembilan and in 1950 he executed a charge of the land in favour of the respondent. In 1962 the respondent commenced proceedings against the appellant but these were discontinued and a new memorandum of loan and charge was executed on August 25, 1964. The relevant documents were prepared by solicitors and it was originally arranged that they should be signed on August 22, 1964. The parties did not come on the appointed day but came instead on the next day and the documents were then signed. The documents had however been prepared on the assumption that they would be signed on August 22, 1964, and the dates had either been left blank or in the case of the memorandum had been shown as August 22. When the documents were signed the solicitor entered the date "23rd August" in every place where the date had been left blank except on the borrower's authenticated copy of the memorandum and the borrower's copy of the agreement; but he omitted to alter the dates which were already shown as August 22 or September 22. Subsequently he found the mistake and with the consent of the solicitors for the appellant, he altered the dates on the copies of the memorandum in his possession. The copies in the possession of the appellant were not however altered. The appellant in his defence alleged (a) that the transaction between himself and the moneylender was unlawful by reason of the name in which the moneylender carried out the transaction in that he did not disclose the names of all the partners of his firm in applying for the licence under the Moneylenders Ordinance; (b) that the memorandum was insufficient because of the mistake made in the dates and because the memorandum did not set out all the terms of the contract of the loan and (c) the authenticated copy did not comply with the requirements of section 16 as it was not an exact copy of the memorandum.

Held: (1) as the respondent in this case had used the name under which he was authorized to carry on the business of moneylending, there was no contravention of any of the provisions of the Moneylenders Ordinance;

(2) the memorandum in this case must be read with the charge and the agreement between the parties and so read it did set out all the terms of the contract of the loan including the previous transactions between the parties;

(3) the alterations made on the memorandum were made simply to remove ambiguities arising from clerical errors and did not in any way alter the sense of the memorandum;

(4) the authenticated copy must be read together with the other documents delivered to the borrower and so read the missing dates were clearly supplied and although the authenticated copy was not an exact copy of the memorandum this was not fatal, as the defects in the copy could be remedied by a consideration of the other documents.

Cases referred to:—

(1) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152; [1962] A.C. 302.

(2) *Kasumu* v. *Baba-Egbe* [1956] 3 All E.R. 266; [1956] A.C. 539.

(3) *Edgware Trust Ltd.* v. *Lawrence* [1961] 3 All E.R. 141.

(4) *Abirami Ammal & Anor.* v. *Meyappa Chettiar* [1959] M.L.J. 149.

(5) *Eldridge and Morris* v. *Taylor and wife* 47 T.L.R. 516.

(6) *T. W. Bennet & Co. Ltd.* v. *Smith* 47 T.L.R. 392.

(7) *Sherwood* v. *Decley and wife* 47 T.L.R. 419.

(8) *Quinn* v. *Leathem* [1901] A.C. 495, 506.

(9) *Reading Trust Ltd.* v. *Spero* [1930] 1 K.B. 492.

(10) *Re Hewer* 21 Ch.D. 871.

(11) *Gardner* v. *Shaw* 24 L.T.N.S. 319.

(12) *Sharp* v. *McHenry* 38 Ch.D. 427.

(13) *Thomas* v. *Roberts* [1898] 1 Q.B. 657.

(14) *Coates* v. *Moore* [1903] 2 K.B. 140.

(15) *Burchell* v. *Thompson* [1920] 2 K.B. 80.

(16) *Commercial Credit Co. of Canada Ltd.* v. *Fulton Brothers* [1923] A.C. 798.

FEDERAL COURT.

Edgar Joseph Jr. for the appellant.

Heng Cheng Swee for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This appeal arises from an attempt by a borrower of money to avail himself of the provisions of the Moneylenders Ordinance to avoid the repayment of money he has borrowed. This, however, is a court of law and not a court of morals and it is on that basis that the case must be decided. I would make the further observation that the case is probably unique in the history of litigation arising out of the law relating to moneylending in this country or in the United Kingdom because of the fact that at every stage of the transactions between them each of the parties has been attended and assisted by his solicitor.

The facts are not in dispute. The appellant ("the borrower") is the registered proprietor of a piece of land in Negri Sembilan and the respondent ("the moneylender") is a moneylender who at all material times held a licence under the Moneylenders Ordinance.

On 15th December, 1960, the borrower executed a charge of the land in favour of the moneylender to secure a loan of a principal sum of $230,000 for a period of six months and then payable on demand with interest at the rate of 12%.

The principal sum was not repaid on demand and on 2nd January, 1962, the moneylender commenced proceedings by way of Originating Summons (Selangor Originating Summons No: 1 of 1962) for foreclosure and sale under the charge.

The borrower set up a great number of technical defences under the Land Code and the Moneylenders Ordinance but in the event the parties came to an agreement, which was reduced to writing, whereby the proceedings under the Originating Summons were discontinued on certain conditions and in pursuance of this agreement notice of discontinuance dated 23rd August, 1963, was filed on 9th September, 1963.

By this agreement the parties undertook to discontinue the proceedings in Originating Summons No: 1 of 1962 and the moneylender agreed to forego all claims for interest on the original loan up to the day preceding the signing of the agreement and to execute a discharge of the charge of 15th December, 1960. The borrower for his part undertook to execute a memorandum for a new loan of $230,000, to execute and deliver to the moneylender a fresh charge in respect of the land by way of security for this new loan and to pay interest at the rate of 7% per annum by monthly instalments.

The parties took steps to implement the agreement. These included the execution of a memorandum of loan under section 16 of the Moneylenders Ordinance and of a charge of the borrower's land. This charge was executed on 23rd August, 1963, and was made to secure a loan of $230,000 with interest at the rate of 7% per annum and repayable on 23rd August, 1964.

The amount secured by the charge was not paid on the due date and on 24th September, 1964, the moneylender issued the statutory notice under the provisions of the Land Code requiring payment of the principal and of interest up to 23rd September, 1964. That notice was served on the borrower but it was not complied with and the moneylender commenced the present proceedings for foreclosure and sale on 11th November, 1964.

The borrower raised a great number of defences under the Moneylenders Ordinance, all of them of a purely technical nature. In the event, however, Ong J. found that these were without merit and gave judgment in favour of the moneylender.

Against that decision the borrower has now appealed and it is impossible to refrain from observing, though this of course is not strictly speaking relevant, that if his appeal is successful he will depart rejoicing in the knowledge that he is under no legal liability to repay a sum of over $200,000 which he has borrowed. It is true that it would appear at first sight that he will also depart with a somewhat tarnished commercial reputation but as the successful hero of the case of *Chai Sau Yin* v. *Liew Kwee Sam* [1] he may regard this risk with a certain equanimity.

The first group of grounds on which the borrower has attacked the transaction between himself and the moneylender is that it was unlawful by reason of the name in which the moneylender carried out the transaction.

Section 5(1) of the Moneylenders Ordinance provides that every moneylender shall take out an annual licence. Section 5(2) provides that a licence shall be taken out in respect of each name in which moneylending business is conducted. Section 5(3) provides that a licence taken out by a partner in a firm shall be deemed to be a licence to the firm so as to make every active partner subject to the provisions of the Ordinance as if he himself had taken out a licence. Section 6(1) provides that every licence issued to a moneylender shall state his true name and the name under which he is authorised to carry on business and that no licence shall authorise a moneylender to carry on business

otherwise than under his true name or, if an agent, the true name of his principal or in the name of a firm in which he is a partner and section 6(2) provides that a licence taken out in any name other than the moneylender's true name shall be void. Finally, section 8 provides that any person who takes out a licence in any name other than his true name, or who carries on business as a moneylender in any name other than his authorised name or enters into any agreement or takes any security for money otherwise than in his authorised name shall be guilty of a criminal offence. By section 2 "authorised name" is defined as the name under which the moneylender is authorised to carry on business by a licence issued under the Ordinance.

Here the true name of the moneylender is Kok Sen Fatt; nobody has suggested that it is Confucius or Chiang Kai-shek. According to the entries in the Register of Businesses, he was one of a number of partners carrying on the business of goldsmiths and moneylenders under the name of "Yoong Shing Finance Company". At the material time he held a licence under the Moneylenders Ordinance which authorised "Kok Sen Fatt" to carry on the business of moneylending under the name of "Yoong Shing Finance Company".

As far as the present case is concerned he is described in the memorandum of loan as "Kok Sen Fatt of Yoong Shing Finance Company", in the charge his description is the same. In the agreement between the parties which is exhibited to the memorandum of loan he is described as Kok Sen Fatt. Finally, the present proceedings have been brought in the name of "Kok Sen Fatt of Yoong Shing Finance Company".

On the face of all this I wholly fail to see any contravention of the provisions of the Moneylenders Ordinance which have been set out. For the appellant, however, it has been argued that there has been some sort of illegality on the part of the moneylender because, when he applied for his licence in the form prescribed by rules made under the Ordinance, under the heading "True Names and Addresses of Partners, if any" he only stated the name of one member of the partnership in addition to himself whereas according to the Register of Businesses there were at the time 15 partners On that it was argued that by virtue of the decision in the case of *Chai Sau Yin* v. *Liew Kwee Sam, supra,* the contract between the parties was so tainted by an illegality as to be unenforceable. In my view this argument is without substance and the case in question has no application here. Apart from differences between the Rubber Supervision Enactment, 1937, and the Moneylenders Ordinance, the defendant in the earlier case was an unlicensed partner in a partnership dealing in rubber; whereas in the present case the plaintiff is a licensed partner. In any event the Moneylenders Ordinance draws a distinction between "active" partners and others [see section 5(3)].

The other grounds on which the borrower has relied arise from alleged failures to comply with the much litigated provisions of section 16 of the Moneylenders Ordinance.

Briefly, that section provides that no contract for the repayment of money lent by a moneylender and no security given by the borrower in respect of any such contract shall be enforceable unless before the money is lent or the security is given, as the case may be, a memorandum in writing of the contract is signed by the parties to it and unless a copy of the memorandum authenticated by the lender is delivered to the borrower. The memorandum is required to state all the terms of the contract of loan and in particular to show separately and distinctly the date of the loan, the principal and the rate of interest.

At this stage it becomes necessary to resume the narration of the facts of the case which, it should be reiterated, are in no way in dispute.

It had been agreed between the parties that the various documents necessary to carry out their intentions regarding the borrower's indebtedness to the moneylender should be executed on 22nd August, 1963. In preparation for this the following four documents were prepared by Mr. Heng the moneylender's solicitor:—

(1) A document setting out the terms of the agreement between the parties relating to the discontinuance of Originating Summons No: 1 of 1962. The date of this was left blank.

(2) A memorandum of loan under section 16 of the Moneylenders Ordinance which provided for the loan of a principal sum of $230,000 with interest at the rate of 7% per annum monthly for a period of 12 months. It further contained the following clauses:—

"The borrower shall before receipt of the abovementioned sum of $230,000 (Dollars Two Hundred and Thirty Thousand Only) execute in favour of the lender a new memorandum of charge over his land held under Negri Sembilan Grant for Land No. 1490 for Lot 320 in the Town and District of Seremban in area of 1 acre 2 roods 30 poles, as security for the repayment of the said loan and interest thereon as aforesaid in the form of and containing the terms and conditions in the draft memorandum of charge annexed hereto and marked 'A'.

The borrower shall use the principal sum borrowed hereby to settle the previous loan of a similar sum as provided for in an agreement to be executed by the parties a copy of which agreement is attached hereto and marked 'B'."

There was added to the statement of particulars of the loan a form of receipt to be

signed by the borrower. The dates in this document were either left blank or stated to be 22nd August, 1963.

(3) A memorandum of charge over the land in the statutory form. The dates in this were left blank.

(4) A carbon copy of the memorandum of loan under section 16 with a form of authentication typed on the bottom to be signed by the moneylender. The date of this was left blank.

On the appointed day the parties did not come to Mr. Heng's office, but the following day, that is 23rd August, the moneylender, the borrower and the borrower's solicitor, Mr. Tan, came to Mr. Heng's office. Mr. Heng handed the prepared documents to Mr. Tan. At this stage the blank dates had been already filled in with the date 23rd August, 1963, except the blank space for "date of loan" in the memorandum. Mr. Tan read the documents to the borrower and then said they were in order. Then the parties signed the documents. The moneylender signed 3 copies of the agreement. Then both parties signed the memorandum of loan. Then the borrower signed the charge. The certificate of authentication was also signed by the moneylender but just when it is not quite clear.

After the charge was executed the moneylender handed a cheque for $230,000 to the borrower who endorsed it and handed it back to the moneylender. The moneylender then gave the borrower a receipt in full settlement of the previous loan and signed a discharge of the previous charge. The borrower then signed the receipt portion of the memorandum of loan. The parties then departed either the borrower or his solicitor taking with him copies of all the documents including the authenticated copy of the memorandum of loan.

As has been said the documents had been prepared on the assumption that they would be signed on 22nd August and the dates had either been left blank or in the case of the memorandum had been shown as 22nd August. At the meeting on 23rd August Mr. Heng dealt with this but unfortunately he did not deal with it completely. It should be added here that there has never been any suggestion of any impropriety on the part of Mr. Heng and that any blame there may be for carelessness must be shared by the borrower's solicitor, Mr. Tan, who though he read the documents did not notice what had happened.

What Mr. Heng did was this, and this is not denied. Before the documents were signed he inserted in every place with two exceptions where the date had been left blank the date "23rd August". The two exceptions were in the borrower's authenticated copy of the memorandum and the borrower's copy of the agreement. He omitted, however, to alter the dates which were already shown as 22nd August or 22nd September.

The following day he noticed this omission and spoke to Mr. Tan on the telephone. Mr. Tan agreed that the dates in question should be altered and Mr. Heng accordingly did so in all the copies of the memorandum in his possession but of course he could not do so in the copies which had been handed to the borrower. Then on 28th August the parties came to his office and signed the alterations but the borrower did not produce his copy of the memorandum. The following day all the copies of the documents with the dates corrected which were in the possession of Mr. Heng were stamped, and a copy of each was sent to the borrower. Finally a notice of discontinuance in Originating Summons No: 1 of 1962 was filed by the moneylender's solicitors on 9th September, 1963.

On these facts it was the case for the borrower that the charge, which is the security for the loan, is not enforceable by reason of section 16 of the Ordinance because no memorandum as required by the section was signed by the parties before the money was lent and because no authenticated copy of the memorandum was delivered to the borrower before the money was lent. It is, of course, clear that if the premises here are made out the conclusion of non-enforceability follows (see *Kasumu* v. *Baba-Egbe* [2]).

There are three main grounds on which the memorandum has been attacked. *First*, as signed on 23rd August it did not set out the terms of the loan because a number of dates were wrongly stated. *Second*, it was not effectively signed until the dates were corrected and corrections signed on 28th August and that was after and not before the money was lent. Third, neither on 23rd nor on 28th August did the memorandum set out all the terms of the contract of the loan because it did not state the terms of the former loan which was in effect renewed.

The authenticated copy of the memorandum was attacked on the grounds that whether the memorandum was good or bad the authenticated copy delivered to the borrower was not an exact copy of it and therefore did not comply with the requirements of section 16.

Before dealing with these matters in detail it is necessary to deal with an argument that has been one of the main parts of the borrower's case. That is that we should regard as the memorandum of the contract only the sheet of paper that is headed "Memorandum under section 16" and that we should consider it in isolation and without regard to the contents of the other documents in the case.

To my mind this is wrong and, with respect, the English cases as to how far reference may be made to the security given for a loan may be considered in interpreting the memorandum of loan are not really in point (see the cases cited in *Meston* on "Moneylenders" (4th Ed.) at pp. 141 and 142 and the later case of *Edgware Trust Ltd.* v. *Lawrence* [3]). Though I would observe that if this be wrong and if they are in point a consideration of them would lead to the same conclusion as that at which I have myself arrived though *per aliam viam.*

The truth is that there is no statutory form prescribed which the memorandum must follow. Generally it is contained in a printed form used by most local moneylenders with which we are all familiar and that is a form which has repeatedly stood the test of examination by the courts. But there is no reason why in any particular case the parties should not draft their own form, always so long as it complies with the conditions of section 16, that is to say so long as it sets out all the terms of the contract of loan. In the present case the memorandum clearly consists of the three documents — the document entitled "Memorandum under section 16", the charge, and the agreement between the parties from which the transaction stemmed. The first document refers *in gremio* to the charge and after describing it states it is "annexed hereto and marked A". It likewise refers to the former loan and the agreement regarding it "a copy of which agreement is attached hereto and marked 'B' ". And the charge is marked "A" and the agreement is marked "B" and both are attached to the first document. From all of this it would seem to be clear that the three documents are to be read as one and together constitute the memorandum as required by the section.

On this point some argument was pressed on as based on the case of *Abirami Ammal & anor.* v. *Meyappa Chettiar* [4] where this court held that the Ordinance differentiated between the contract of loan and the security and a charge of land in the statutory form was not in itself a sufficient memorandum for the purposes of the Ordinance. In that case, however, there was no writing at all except the instrument of charge and we took the view that that was insufficient because it did not state the date of the loan.

Turning now to the memorandum thus viewed as it read when it was signed, the position is as follows.

In the document headed "Memorandum" the date of loan is stated to be 23rd August. As regards interest it is stated that interest is payable by equal instalments on the 22nd day of each month, the first of such payments to be made on 22nd September, but when we turn to the charge we find it says that payments of interest are to be made on the 23rd day of each month, the first of such payments to be made on 23rd September. Then the first document states the period of the loan to be twelve months as from 22nd August and that the principal sum shall be payable on 22nd August, 1964, but when we turn to the charge we find that the principal sum is payable on 23rd August, 1964. Finally the receipt clause signed by the borrower acknowledges having received the sum of $230,000 after the foregoing part of the document and the charge had been signed by himself and the moneylender on 23rd August.

Now, even if the document entitled "Memorandum" be considered in isolation it is abundantly clear that the loan was made on 23rd August, 1963, and was for a period of twelve months and was repayable on 23rd August, 1964. That is correct. And indeed by his acknowledgment on the face of the document that he had received the money on 23rd August the borrower is probably estopped from asserting the contrary. On the other hand, again considered in isolation, it is clear that interest is stated payable on the 22nd day of each month. That is wrong. The document is not, however, to be considered in isolation. For reasons that have been stated it is to be read with the charge. Thus considered we have confirmation of the view that the date of the loan was 23rd August. And in the circumstances the contradiction between the terms of the charge and the terms of the first instrument as to the dates for payment of instalments of interest is clearly to be determined in favour of the dates stated in the charge, that is the 23rd of each month.

And before going further I would observe that the document entitled "Memorandum" is to be read not only with the charge but also with the agreement between the parties and this disposes of any argument that the memorandum does not set out the circumstances of the previous loan for apart from the references to the previous loan in the first document the whole history of the previous transaction between the parties was fully set out in the recitals to the agreement.

Having arrived at these conclusions it is unnecessary to consider at any length the argument that the memorandum was not really executed till 28th August when the parties signed the alterations of "22nd August" to "23rd August". These alterations did not in any way alter the sense of the memorandum. They simply removed a possible apparent source of ambiguity as to its construction arising from clerical errors which both parties fully admitted to be such.

It now becomes necessary to deal with the adequacy of the authenticated copy which was delivered to the borrower.

It is beyond question that that copy was not an exact copy which reproduced every word and figure in the memorandum as it was executed on 23rd August. It reproduced all the errors in the memorandum which have been mentioned. But it did not reproduce the signatures, at the commencement it omitted under the heading "Date of Loan" the figures "23" before the word "August", and in the receipt clause it omitted the figures "23" before the words "day of August".

Here the case for the borrower was based on the cases of *Eldridge & Morris* v. *Taylor & wife* [5] and *Bennett & Co. Ltd.* v. *Smith.*[6]

In the first of these cases no memorandum at all was delivered to the borrower, and the Court of Appeal held that by reason of section 6 of the Moneylenders Act, 1927, this was fatal to the loan. In the course of his judgment Scrutton L.J. referred to section 6 and said:—

"Parliament thought that the borrower should be protected by having an exact copy of the contract to which he had agreed."

In *Bennett & Co. Ltd.* v. *Smith* (which was a decision of a divisional court) a copy of the memorandum of loan had been delivered but in it the date of the loan, which was 7th October, was stated as "October", the figure "7" having been omitted. The loan had been secured by a bill of sale, which was mentioned in the memorandum, which contained the correct date and a copy of which had been supplied to the borrower. It was held that the defects in the copy of the memorandum, though they might be trivial, were fatal. Swift J. said: "the copy must be a true one" and quoted the observation by Scrutton L.J. which has been quoted here. He said that one might look at the security to supply omissions in the memorandum but that defects in the copy could not be supplied by looking at the security, "one did not get from that a copy of the memorandum, although one might get materials from which a fresh copy of the memorandum could be made, which was not what the Act of Parliament required". He mentioned the case of *Sherwood* v. *Decley & wife* [7] where it had been held that the omission of the borrower's signatures was not fatal but pointed out that in that case there was no other defect in the copy.

In the present case the trial judge, though he considered the case of *Bennett & Co. Ltd.* v. *Smith,* was not prepared to follow it. He reminded himself of the much-quoted observation by Lord Halsbury that "every judgment must be read as applicable to the facts proved,....since the generality of the expressions which may be found there are not intended to be an exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ....a case is only an authority for what it actually decides." (*Quinn* v. *Leathem* [8]). He then said that the words of Scrutton L.J. in *Eldridge & Morris* v. *Taylor & wife* that the borrower must be provided with an exact copy of the memorandum must be regarded as *obiter* because in that case there was no copy at all and therefore the nature of the copy required did not arise. As regards *Bennett & Co. Ltd.* v. *Smith* he took the view that *Sherwood* v. *Decley & wife* was authority for the contrary view and "there are other authorities for the contrary view that trivial or mere clerical errors do not invalidate a memorandum of loan", notably *Reading Trust Ltd.* v. *Spero.*[9]

For myself I regret that I cannot agree that authorities as to what is a sufficient memorandum can be accepted as having much, if any, bearing on the question of what is a sufficient copy of a memorandum. And that is particularly so in view of the extreme strictness with which the courts have always approached the interpretation of the law relating to moneylenders.

Nevertheless, with great respect, I would express the view that *Bennett* v. *Smith* is not to be followed.

So far as I am aware there are no United Kingdom cases which have any bearing on the question of what is a sufficient copy of the memorandum for the purposes of section 6 of the United Kingdom Act except the three English cases which have been mentioned. Nor am I aware of any local case regarding the corresponding provision in section 16 of our local Ordinance.

There are, however, certain English cases arising out of the law relating to bills of sale which are in point. These relate to section 10(2) of the Bills of Sale Act, 1878, which requires that a "true copy" of every bill of sale together with an affidavit as to its execution must be filed with the Registrar within 7 days.

In the case of *Re Hewer* [10] the copy filed omitted the day of the month on which instalments of interest were to be paid and this was held not to be fatal. Bacon C.J. said (at p. 875):—

"In what respect is it an untrue copy? A true copy does not necessarily mean an exact copy. It did not in *Gardner* v. *Shaw,*[11] where *Gardner's* name was spelt with an 'e' instead of an 'o'. The Act does not require it to be an exactly exact copy, but that it shall be so true that nobody reading it can by any possibility misunderstand it. Now the omission in this case consists of these words each such payment to be made 'on the third day of each month.' But these are not the only words which are introduced into the sentence; the whole sentence runs thus: 'Provided in case the mortgagor shall pay to the mortgagee the sum of £150 by twelve

consecutive monthly instalments of £10 each; and the first instalment to become due on the 3rd of May and the last on the thirteenth month,' and that last-mentioned date is omitted. Is it possible that any one could be misled?"

In the case of *Sharp* v. *McHenry* (12) a number of blank spaces had not been filled in in the copy filed in consequence of the carelessness of a solicitor though they were filled in in the original. This was held not to be fatal. Kay J. said (at p. 448) :—

"It is said that those blanks in the copy filed are fatal, because they make the copy not a 'true copy', these blanks not occurring in the original mortgage. Well, in the first place, one must ask oneself: Is it possible that any human being could be mistaken as to the effect of the document? Is there any wrong or damage which could arise to anybody from the blanks being left? In one sense it is not a 'true copy', because the blanks are not in the original bill of sale. But supposing the blanks had been in the original bill of sale, would it have been void? Could any one reasonably maintain in a Court of Justice that the original bill of sale would have been in the least degree affected if the blanks had been there? In my opinion it could not; and a Court of Justice is not so bound hand and foot as to come to the conclusion that this is a fatal defect if, supposing that these blanks were in the original bill of sale, the validity of the deed would not be in the least degree less effective.

Then is there any untruth in this copy — untruth, I mean, upon an intelligent understanding of the Bills of Sale Act? In my opinion there is not. A true copy of a thing means a copy which is true in all essential particulars; the mere fact that a copy contains a blank which is immaterial, and cannot mislead anyone as to the effect of the instrument, does not make the copy an untrue copy within the meaning of the Act."

In the case of *Thomas* v. *Roberts* (13) the day of the month on which the bill of sale was executed was omitted and this was held not to be fatal. Wright J. said (at p. 658) :—

"If the defect complained of were a defect in the original bill of sale, no doubt it would invalidate the instrument,.....but the defect in the present case was only in the copy, and any one searching the register and looking at the affidavit filed with the copy.....would find out at once what the true date of the bill of sale was."

And Darling J. said this (at p. 659) :—

"In the present case the omission would not mislead any one who looked at the affidavit, for he would there find the date correctly stated. It is true that in the copy there is no date; but there is no actual inconsistency between the copy and the original, and a person searching would have full notice of the provisions of the bill of sale, if he looked at the affidavit."

In the case of *Coates* v. *Moore* (14) the copy filed omitted the signature of the grantor and the signature and particulars of the attesting witness. This was held not to be fatal. Collins M.R. referred to *Thomas* v. *Roberts, supra,* and continued (at p. 146) :—

"In the case with which we are now dealing, the matters omitted in the copy are contained in the original bill of sale, and also in the affidavit filed under the section. I can see no distinction in principle between the date and the matters omitted in this case. They are equally essential in the bill of sale, and I think can equally well be supplied by the affidavit."

Then there is the case of *Burchell* v. *Thompson.* (15) That was a case where the copy filed was held not to be a "true copy" by reason of the omission of the words "per annum" in the statement of interest there being nothing in the rest of the document to supply the omission.

In the divisional court it was held that the defect was not fatal. Lush J. said this (at p. 87) :—

"The criterion, as laid down by the authorities, is to consider whether or not the copy differs from the original to such an extent that it would mislead any person of ordinary intelligence as to the effect of the original. It is said that the copy of this bill of sale which has been filed with the registrar would mislead an ordinary person, because whereas the original deed described the interest as at the rate of so much per cent. per annum, the copy omitted the words 'per annum'. It is to be observed that the county court judge did not say that an ordinary person would be misled by this copy, but that a person who was 'unsophisticated or unbusinesslike might.....be puzzled.' He did not apply the right test, which, as I have said, is to inquire whether an ordinary person would be misled. In my opinion a person of ordinary intelligence would not be misled by this copy as to the effect of the original document. I cannot believe that a person who desired to know what the document meant would fail to understand that interest at the rate of 55 per cent. meant interest at that rate per annum."

And Sankey J. who agreed referred to *Sharp* v. *McHenry, supra,* and said this (at p. 90) :—

"I should have thought that it was obvious that the statement in this copy that the interest was to be at the rate of 55 per cent. meant that it was to be at that rate per annum."

The decision of the divisional court was reversed in the Court of Appeal but it is important to note what was said there. Bankes L.J. said (at p. 99) :—

"It was essential to include the words 'per annum' in the bill of sale, because the form in terms provides that if the interest is at a rate per annum that fact must me stated. It was stated in the original; it is omitted in the copy. How can it be said that such an omission is immaterial? There is nothing, so far as I can see, in the other provisions of the copy which would enable any person, reading the copy, to be certain what the rate of interest provided in the original was; and I feel unable to jump to the conclusion that because the interest is stated to be at the rate of 55 per cent. it must necessarily be per annum. I do not think that a copy, which leaves the reader in the position that he must guess what the original contains, can in any proper sense of the word be called 'a true copy' of that original."

And Atkin L.J. said this (at p. 105) :—

"Upon the question whether the copy filed is a true copy, I have some little doubt turning upon the precise words of this bill of sale. It appears to me however to be plain that it is not sufficient for a copy, to be a true copy, to state with complete accuracy in a summary form the effect of the stipulations contained in the original document. It is not merely a document that is to state the true legal effect of the original; it is to be a copy of the original. With a little doubt, because I am inclined to think that on the true construction of the terms of the document, '55 per cent.' means '55 per cent. per annum,' I come to the conclusion that as in the original the words are material they ought to have been in the copy; and I come to the conclusion upon the whole that

this copy was not, within the meaning of the Act, a 'true copy' of the original."

Finally, there is the case of *Commercial Credit Co. of Canada, Ltd.* v. *Fulton Brothers* [16] which was a case where a copy was held to be so faulty as to be fatal to the validity of the original transaction. In that case the Privy Council appeared to accept the judgment of Kay J. in *Sharp* v. *McHenry, supra.* With regard to *Burchell* v. *Thompson, supra,* Lord Sumner said this (at p. 806) :—

"An expression used by Lush J. in *Burchell* v. *Thompson* was relied on by the learned Chief Justice of Nova Scotia. It was that the criterion is 'whether or not the copy differs from the original to such an extent that it would mislead any person of ordinary intelligence as to the effect of the original'. This phrase, which did not purport to be an exact or exhaustive summary of the decisions, was used in a case where Sankey J. considered the variance to be a mere clerical error, and Lush J. deemed it to be unimportant. The Court of Appeal took the opposite view of the error itself. Scrutton L.J. confined the matters in which error is unimportant to those 'which do not in any way affect the purpose for which a true copy is required'; and Atkin L.J. observes that 'as in the original the words are material, they ought to have been in the copy'."

His Lordship then dealt with the instant case as follows (at p. 807) :—

"Their Lordships can find nothing in the decided cases to warrant the view that such discrepancies between the original and the copy as exist in the present case and are above described can be reconciled with the truth of the copy. Who can say that if the copy had been inspected in order to find out the true position of the Automotive Supply Company, the intending purchaser would not have been misled? The Act promises him, if he chooses to make use of it, a true copy, not a puzzle. He is to inspect it, not to recover the original by a process of conjectural amendation."

All of these cases are prior in date to *Eldridge* v. *Taylor,* to which they are not relevant, and to *Bennett* v. *Smith,* to which they are very relevant. And in neither of these cases were they cited to the court. From them there is to be deduced a consistent current of judicial opinion that for the purposes of section 10 of the Bills of Sale Act, 1878, the "true copy" of a bill of sale need not be a copy which exactly reproduces the original in every detail but that there is a sufficient compliance with the section if defects in the copy filed can be remedied by consideration of the document itself or any other material to which the person entitled to the benefit of the copy has access, as for instance the affidavit of execution.

It is difficult to see why the same principle should not be applied to the question of what is compliance with the provisions of the Moneylenders Ordinance requiring delivery of a copy of the memorandum of loan. After all the objects of the relevant portions of the two statutes are very similar. In the first case it is the protection of creditors against dishonest debtors; in the second case it is the protection of debtors against dishonest creditors, in each case it is the protection of one of the parties to a contract against the other having regard to the possibility of malpractices which the Legislature considers to be peculiarly likely in the case of transactions of certain types, the protection taking the form of requiring an authenticated copy of the contract between the parties.

Applying that principle in the present case we are clearly entitled to look at all the material which was delivered to the borrower, that is to say the three connected documents which have been described and in my view when that is done the missing dates are clearly supplied. And as regards the missing signatures, the omission of that of the moneylender is supplied by his signature to the certificate of authentication and that of the borrower was not a fatal omission for the reasons stated by Macnaghten J. in the case of *Sherwood* v. *Decley, supra.*

I would dismiss the appeal with costs.

Pike C.J. (Borneo): I have had the opportunity of reading the judgment of the learned Lord President and find myself in full agreement with it. I only wish to add a few words in support of that part of his judgment which deals with the question whether the copy of the note or memorandum which under section 16 of the Ordinance is required to be delivered to the borrower must be an exact copy.

In considering the requirements of section 16 in this regard it is in my opinion necessary to bear in mind the difference between the English Act and the local Ordinance. While the equivalent section of the English Act requires the copy of the note or memorandum to be delivered to the borrower "within seven days of the making of the contract" section 16 requires it to be delivered "before the money is lent". It seems to me clear therefore that while the English Act is designed to ensure that the borrower shall have in his possession a copy of the contract he has already entered into, the local Ordinance is designed to ensure that the borrower shall be afforded an opportunity of examining the terms of the contract which the lender proposes that the borrower shall accept *before* it is entered into. It may be said that this does not take account of the requirement that the copy delivered to the borrower must be authenticated by the lender. In my view the only purpose of requiring authentication must be to avoid the possibility that the lender might in the absence of authentication allege that the copy in the possession of the borrower is not the copy which he delivered to him.

If the borrower, having examined the copy delivered to him before the contract is executed, succeeds in persuading the moneylender to modify any of the terms in his (the borrower's)

favour and if the moneylender and borrower then sign the note or memorandum under section 16 varied accordingly, is it to be said that because, by oversight or by design on the part of the borrower, the copy is not amended to show the variation agreed subsequent to the time when the copy is required by the statute to be delivered that the borrower is to be absolved from his obligation.

In the words of Lord Radcliffe in *Kasumu* v. *Baba-Egbe* (2) "the statute is not concerned with the vice of its (the contract's) content but with the vice of the conditions under which it was made". As the learned Lord President has drawn to notice there was no vice in the conditions under which the contract was made. The borrower had his solicitor beside him advising him at all stages of the negotiations and at the execution of the contract.

For the above reasons I am of opinion that the *ratio decidendi* of the English cases such as (1) *Eldridge and Morris* v. *Taylor and Wife* (5) and (2) *T. W. Bennett & Co. Ltd.* v. *Smith* (6) in which the sufficiency or otherwise of the copy of the note or memorandum delivered to the borrower has been considered is not applicable in considering the provisions of section 16 in this regard.

Gill J.: I have had the advantage of reading the judgment of the learned Lord President and am in full agreement with it.

Appeal dismissed.

Solicitors: *Joseph & Son; Heng, Chen & Co.*

REDLAND TILES LTD. & ORS. v. KUA HONG BRICK TILE WORKS

[O.C.J. (Abdul Aziz J.) March 16, 1966]

[Kota Bahru — Civil Suit No. 52 of 1964]

Patents and Designs — Design registered in United Kingdom — Infringement — Injunction — United Kingdom Designs (Protection) Ordinance, 1949, s. 2.

Injunction — Infringement of registered design — Tiles — Destruction order — Disposal order.

This was an action for infringement of a registered design in relation to tiles. It was alleged that the defendants manufactured tiles of the like shape and configuration as the design registered by the plaintiffs in the United Kingdom. The defendants' contention was that the tiles were of different designs and appearance.

Held: in actions for infringment of a registered design the eye is the sole test and looking at the two sets of tiles it was clear that the sizes, profiles and configuration of these tiles were so similar that they were likely to confuse and therefore the application for an injunction must be granted.

CIVIL SUIT.

H. L. Wrigglesworth for the plaintiffs.

Isahak bin Abdul Hamid for the defendants.

Abdul Aziz J. (delivering oral judgment): This is an action for infringement of a registered design and not an action in relation to trade marks. Therefore, the question of passing off has no relevance and the question of the names of the various products also has no relevance.

Plaintiffs No. 1, i.e. Redland Tiles Limited are the proprietors of a valid registered design bearing No. 862055 for roofing tiles, the novelty features of which, as set out in the certificate, lie in the feature or shape and configuration of the article as shown in the representation annexed thereto, a specimen of which was exhibited in court and produced for inspection. By virtue of section 2 of the United Kingdom Designs (Protection) Ordinance, 1949 the registered proprietors enjoy, in the Federation, the like rights and privileges as though the certificate has been issued in the United Kingdom with an extension to the Federation. Plaintiffs No. 2, i.e. Concrete Industries (North Malaya) Ltd. are the licensees of plaintiffs No. 1 to manufacture tiles for sale in Malaya. It was alleged that the defendants manufactured cement tiles of the like shape and configuration as the design registered in the United Kingdom. The defendants' contention was that these tiles were of different designs and appearance. They went on to contend that there were distinct differences between the two types of tiles in the markings and in the configuration and that, therefore, the members of the public are not likely to be deceived thereby. As I have said earlier the question of passing off has no relevance at all to the proceedings. *Halsbury's* (3rd Ed.) Volume 38 at page 675 has this to say in regard to infringement of registered design:—

"The registration of a design under the Registered Designs Act, 1949, gives to the registered proprietor the exclusive right in the United Kingdom and the Isle of Man (and by virtue of the Ordinance also in the Federation) to make or import for sale or for use for the purpose of any trade or business, or to sell, hire or offer for sale or hire, any article in respect of which the design is registered; the right extends to articles to which either the registered design or a design not substantially different from the registered design has been applied, and includes the right to make anything for enabling any such article to be made as aforesaid in the United Kingdom or the Isle of Man or elsewhere. Any infringement of this exclusive right may give rise to proceedings. Knowledge of the registration of a design is in general immaterial to infringement.

The question whether a design which is alleged to infringe a registered design is or is not an infringement must be determined by the eye alone. The court has to decide only whether the alleged infringement has the same shape or pattern, and must eliminate the question of the identity of function, since another design may have parts fulfilling the same functions without being an infringement. Small differences in detail do not necessarily prevent infringement, but generally speaking, if under normal conditions of user the eye would not confuse the two designs, there is no infringement. If there is some outstanding feature of the registered design which is not reproduced, this would generally